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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1110

MICHAEL J. STAVOLA, *Petitioner*

v.

STATE OF NEW JERSEY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPERIOR COURT OF NEW JERSEY

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The petitioner, Michael J. Stavola, prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Superior Court of New Jersey affirming petitioner's conviction entered by the Superior Court of New Jersey, Law Division, Monmouth County.

OPINION BELOW

The opinion of the Appellate Division of the Superior Court of New Jersey is reprinted in the Appendix at p. 1a. The Supreme Court of New Jersey's Denial of Certification is reprinted in the Appendix at p. 21a.

JURISDICTION

The judgment of the Appellate Division of the Superior Court of New Jersey, affirming petitioner's conviction was entered on August 3, 1973. The petition for certification to the Supreme Court of New Jersey was denied on October 2, 1973. Mr. Justice Brennan signed an order, December 29, 1973, extending the time for filing this petition to and including January 15, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the defense of entrapment should be "constitutionalized" and made applicable to the state courts through the due process clause of the Fourteenth Amendment of the United States Constitution.

2. Whether the petitioner was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment because the trial court failed to sever a co-defendant, Martinelli, when it was clear that evidence admitted against only Martinelli was severely prejudicial to Stavola and because the court failed to distinguish between petitioner's conduct and that of Martinelli in its instructions.

THE CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

THE FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

THE FOURTEENTH AMENDMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 22, 1971, after a jury trial, petitioner, Michael J. Stavola, and a co-defendant, Joseph Martinelli, were convicted of bribery and obstruction of justice. Martinelli was also convicted of attempting to induce a police officer to commit misconduct in office.

Prior to trial Stavola had moved for severance on the grounds that he could not get a fair trial with Martinelli. This motion was denied. Stavola's defense was that he had been entrapped.

In September, 1970, the Monmouth County, New Jersey, Grand Jury returned an indictment charging Stavola with assault and battery on a municipal police officer, Dennis J. Vaspori, and obstructing Officer Vaspori in the performance of his duties.

On October 29, 1970, Joseph Martinelli, then an employee of Stavola, mentioned the fact of this indictment to Detective James Sweeney of the New Jersey State Police. Martinelli next met Sweeney at the Coach Restaurant on December 17, 1970, and told him that if anybody could help Stavola with his problem they could "Write their own ticket" (II.Tr. 43-44). This conversation was reported to Sweeney's superior, Detective William Turner (I.Tr. 293). Turner directed Sweeney to attempt to set up a meeting with Stavola and to record everything that was said (I.Tr. 271). Pursuant to Turner's orders, Sweeney then made several telephone calls to Martinelli on December 17 and 18 to arrange a time for Martinelli to introduce Sweeney to Stavola (III.Tr. 527). These calls were tape recorded by Sweeney (II.Tr. 56, 60).

On December 18, 1970, Sweeney, after placing tape recording equipment on his body, went to the Carriage House Restaurant where he conversed with Martinelli out of Stavola's presence and then met Stavola (II.Tr. 68-70). At this meeting, the question of money is brought up first by Sweeney (III.Tr. 557-560). Sweeney then left Martinelli to make a telephone call; on his return, Martinelli took him to meet Stavola (II.Tr. 70). Sweeney said he knew of Stavola's problem. Stavola told Sweeney that the only way to handle it was to get the policeman to tell the truth (III.Tr. 334, 419). There was no mention of money being paid to Sweeney during this conversation (III.Tr. 336-338). After Stavola ended his conversation with Sweeney and left, Sweeney and Martinelli continued to discuss what was to be done. Sweeney pointed out that Stavola was "not too committed" to the plan (III.Tr. 358).

Martinelli called Sweeney several times during the months of January and February, 1971. However,

Stavola did not contact Sweeney during this period. On February 23, 1971, Sweeney called Martinelli and asked him to set up a meeting with Stavola (IV.Tr. 891). Martinelli arranged to meet Sweeney later that day. Sweeney, driving a vehicle equipped with a microphone and tape recorder, met Martinelli outside the Carriage House Restaurant (II.Tr. 112). During this conversation, Sweeney noted again that in their initial meeting Stavola had been very non-committal.

On February 25, 1971, in the parking lot of the Carriage House Restaurant, Sweeney met with Stavola for the second time. Martinelli was also present (II.Tr. 137-138). The part of the conversation which occurred in Sweeney's auto was taped by a recorder hidden in the rear seat (II.Tr. 139). Stavola's tape recorded statements at this meeting primarily consisted of monosyllabic responses to Sweeney's comments about Stavola's situation. Then Sweeney told Stavola that the prosecutor would play on the fact that he was Italian and successful, thus denying him a fair trial. It was Sweeney, not Stavola, who first mentioned that a "deal" could be made with a specific prosecutor and a specific judge. Sweeney lied to Stavola telling him that if he were convicted, the statute required that he be sentenced to no less than two, no more than seven years and that he be fined $2,000. (Part of the conversation between Sweeney and Stavola occurred outside Sweeney's auto and was thus not recorded.) Sweeney testified that Stavola asked him what it would cost to fix the case. Sweeney replied he did not know what the price would be to reach the judge and the prosecutor. But he arranged to meet Stavola at the Holiday Inn the following day (II.Tr. 150).

The next day Sweeney met Stavola at the Holiday Inn and told him that the price would be $5,000 each for three people: the prosecutor, the judge and "the guy that's setting it up." Later that day in the parking lot of the Colts Neck Inn, Stavola handed Sweeney $5,000 and then left the scene (II.Tr. 158-160). Both conversations were recorded by electronic devices concealed in Sweeney's automobile. These tapes were played for the jury (II.Tr. 157, 162).

Stavola moved for mistrial several times on the grounds that the joint trial with Martinelli unfairly prejudiced Stavola because of conversations between Martinelli and Sweeney were admitted against Martinelli. In these conversations, Martinelli discussed the possibility that he would "fix" other cases and that he was involved with several well-known persons who were under indictment or had been convicted of bribery. These motions were denied.

Part of Stavola's entrapment defense was based on the theory that Martinelli acted as an unwitting agent of the government. He requested an instruction to the effect that if the jury found Martinelli was an unwitting agent of the government, then it could consider that fact in determining whether Stavola was entrapped.[1] This instruction was denied.

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[1] "1. In considering the issue of entrapment with reference only to the defendant Stavola you should consider if the defendant Martinelli either knowingly or unwittingly was being utilized by Det. Sweeney for the purpose of communicating their conversations or any portions thereof to the defendant Stavola. If you so find then the conduct and actions of defendant Martinelli as well as the conduct and action of Sweeney as communicated to the defendant Stavola may be considered by you members of the jury in determining if Michael Stavola was entrapped." (V. Tr. 440)

REASONS FOR GRANTING THE WRIT

I.

This petition raises a substantial question of federal law that is of particular importance because it bears on the question of whether the due process clause requires minimum standards which the states must observe when the defense of entrapment is raised.

From *Sorrells* v. *United States,* 287 U.S. 435 (1932) through *Sherman* v. *United States,* 356 U.S. 369 (1958) to *United States* v. *Russell,* 411 U.S. 423 (1973), this Court, while recognizing entrapment as a valid defense, has been unable to agree on the legal basis for the defense. This has caused significant confusion and controversy in the state and lower federal courts whenever the entrapment defense is raised. This Court has recently given voice to what has only been hinted at in some of the cases sustaining the entrapment defense—that the foundation for the entrapment defense is due process. In *United States* v. *Russell,* 411 U.S. 423 (1973) the majority opinion stated:

> "While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . . the instant case is distinctly not of this breed." [Citation omitted], 411 U.S. 431-432.

This statement for the first time recognized that entrapment may have a legal basis in the principles of due process. If entrapment is grounded on the constitutional basis of due process, then these principles should apply no less in the state courts than they do in the federal courts.

That the entrapment defense has a due process basis has been suggested by the language of several cases. In *Butts* v. *United States,* 273 F.35 (8th Cir. 1921) the Court of Appeals reversed a lower conviction for sale of morphine, characterizing entrapment as "unconscionable and contrary to public policy and the established law of the land," 273 F.35 at 38. *Butts* was cited with approval of Chief Justice Hughes, speaking for the majority in *Sorrells.* Chief Justice Hughes found it would have been "shocking to the sense of justice," 287 U.S. 446, and "abhorrent to the sense of justice," 287 U.S. 449 to allow Sorrells' conviction to stand.

In *Accardi* v. *United States,* 257 F.2d 168 (5th Cir. 1958) the court, after a thorough analysis of the majority and concurring opinions in *Sherman,* points out that:

> "In spite of the sharp differences between the two opinions as to the crucial question in entrapment, the conceptual basis for the defense, and the role of the court, the language of the majority of the court, shows that they attach almost as much importance as the minority to the *conduct of the government agents* [Emphasis in original]. *There is scarcely a decibel's difference in their expressions of shock and outrage at the agents' methods.*" [Emphasis supplied] 257 F.2d at 172-173, n.5

The court held "the agent's conduct [did] not shock the conscience . . ." and thus there was no entrapment as a matter of law.

In *Banks* v. *United States,* 249 F.2d 672, 674 (9th Cir. 1957), the court said of entrapment "A conviction so procured is in violation of the due process provision of the Fifth Amendment. . . ."

In *Russell* v. *United States, supra,* this Court recognized that "The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the due process clause of the Fifth Amendment." 411 U.S. 432. One commentator has pointed out that, ". . . the judicial characterizations of entrapment and of due process violations are oftentimes strikingly similar." He also states that due process affords "the more solid foundation" than "the sheer fiction of Sorrells' statutory interpretation." Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons,* 49 J. of Crim. L., Criminology and P.S. 447, 449 (1959).

In the instant case, Detective Sweeney, through Martinelli, pursued Stavola until he finally took the bait and paid the bribe. The conduct of Sweeney is shocking to the universal sense of justice and clearly violates that fundamental fairness mandated by the due process clause. The following facts show that Sweeney, pursuant to orders by his superior, Turner, solicited a bribe from Stavola.

After Martinelli told Sweeney that if anybody could help Stavola they could "Write their own ticket," Detective Turner ordered Sweeney to set up a meeting with Stavola and to record the conversation (III.Tr. 516). At the meeting of December 18, 1970, Stavola said, not that he wanted to bribe Sweeney to fix the case but rather, that the only way to handle the matter was to have the policeman tell the truth (III.Tr. 334, 419). There was absolutely no mention of money by Stavola. Indeed, Sweeney, in his own words, characterizes Stavola's position at the December 18 meeting as "not too committed" to the plan (III.Tr. 358).

When Sweeney did not hear from Stavola for over six weeks, he asked Martinelli to set up a meeting with Stavola (III.Tr. 362, IV.Tr. 891). He told Martinelli, "The only thing is, I want him to commit himself" (Tape of February 23, 1971). When Sweeney met with Stavola on February 25, 1971, Stavola's tape recorded statements consisted of monosyllabic responses to Sweeney's comments about Stavola's situation. It was Sweeney, not Stavola, who suggested a "deal" could be made with a specific prosecutor and a specific judge.[2] He also lied to Stavola about the punishment he could receive. At this point Stavola swallowed the bait in the trap conceived in the minds of Sweeney and Turner. But it was clearly only as a result of Sweeney's blandishments.

In *Sherman* v. *United States, supra,* this Court pointed out "the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of *creative* activity of law-enforcement officials" (emphasis in the original), 356 U.S. 369, 372. If Stavola had been tried in a United States District Court, the evidence would have required the granting of a motion for judgment of acquittal at the close of the government's case because the "criminal design originate[d] with the officials of the government, and they implant[ed] in the mind of an innocent person the disposition to commit the alleged offense," *Sorrells* v. *United States,* 287 U.S. 435, 442.

The standards applicable to entrapment in the federal courts should be the minimum standards observed by the state courts. "Clearly entrapment is a facet of

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[2] Since this is the crucial conversation which shows that Stavola was entrapped by Sweeney, it is reprinted in the appendix at p. 23a.

a broader problem. Along with illegal search and seizures, wire tapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement." Donnelly, *Judicial Control of Informants, Spies, Stoolpidgeons and Agent Provocateurs,* 60 Yale L. J. 1091, 1111 (1951): The entrapment defense is analogous to the exclusionary rule in illegal search and seizure cases because both are directed at preventing improper police conduct. Illegal searches and seizures are expressly forbidden by the Fourth Amendment, while entrapment has not been recognized as constitutionally grounded. In *Olmstead* v. *United States,* 277 U.S. 438 (1928), the Court held that illegally obtained wiretap evidence could not be excluded because such conduct was not specifically barred by the Constitution. However, the Court has since departed from the narrow view upon which that decision rested and held that the "underpinnings of *Olmstead* . . . have been so eroded that the doctrine there enunciated can no longer be regarded as controlling." *Katz* v. *United States,* 389 U.S. 347, 353 (1967). The Court should now recognize that the better legal basis for the entrapment defense is due process.

Entrapment, one of the devices of lawless law enforcement, cannot be tolerated because it is "unfair" "unconscionable" and "shocking to the universal sense of justice". The defense of entrapment, grounded in the due process clause of the Fifth Amendment, is thus applicable to the states through the Fourteenth Amendment because it is fundamental to our principles of liberty and justice. *Palko* v. *Connecticut,* 302 U.S. 319, 328 (1937).

In the instant case, the principles governing entrapment in the federal courts would have required the

granting of judgment of acquittal. In *United States ex rel. Hassel* v. *Mathues,* 22 F.2d 979 (E.D.Pa. 1927) the court found entrapment, as a matter of law upon operative facts, identical to the facts in this case. Morris and Max Hassel were owners of a brewery. Morris, out of the presence of his brother, offered $500 to a prohibition agent, Hurley, who was watching the brewery. After talking with his colleague, Hurley ". . . told Morris Hassel that he did not want to talk to him; he wanted to talk with Max Hassel." A few days later the agents met Max and Morris Hassel and the Hassels paid them $1,250. Both Hassels were charged with bribery and held for the Grand Jury. Max obtained a writ of *habeas corpus* contending that he had been entrapped. The Court agreed and said:

> "There is no evidence to establish the fact that there was any thought in Max Hassel's mind of offering a bribe to the prohibition officers until *Agent Hurley,* after suggestion of bribery made by Morris Hassel, *had made the latter his agent to bring Max Hassel to the officers and have him take part in the plans for bribery."* [Emphasis supplied.]
>
> * * * *
>
> "While the first suggestion, looking toward the commission of the criminal act, was made by Morris Hassel to the officers, the suggestion which induced a criminal intent in Max Hassel originated with the officers, merely to entrap Max Hassel into the commission of a crime suggested to him [Max Hassel] by them [prohibition officers] through the agency of his brother, Morris Hassel." 22 F.2d 979-980.

Martinelli, like Morris Hassel, may have first suggested the bribe, but later became Sweeney's agent to entrap Stavola in the bribery. The evidence shows

that Stavola, like Max Hassel, had no intention of offering a bribe until he was brought into the scheme by Sweeney through Martinelli. Therefore, the principles applied in *Hassel* should have been applied here.

The Third Circuit Court of Appeals reversed bribery convictions on the ground of entrapment in *Klosterman* v. *United States,* 248 F.2d 191 (3rd Cir. 1958). In that case the evidence showed that while Deeney, an IRS agent, had initially considered a bribe offer from Klosterman, he later abandoned the bribery scheme; but he had been lured back into the scheme after numerous solicitations by a government agent. The court held that Deeney participated in the bribery scheme because of the agent's activity and was therefore entrapped as a matter of law. In the instant case, Sweeney's stated objective was to get "a committal from Stavola" (III. Tr. 378). Sweeney first approached Stavola through Martinelli (III. Tr. 532); he initiated conversations about money with Martinelli (III. Tr. 560-561); he told Stavola he could not get a fair trial because he was Italian and successful; he lied to Stavola (III. Tr. 396), telling him the penalties for assault and battery on a police officer were far greater than they actually were (III. Tr. 397). This is the kind of "creative activity" by government agents which was condemned in *Klosterman* and *Sherman.* Here, as in those cases, the activity should have been deemed entrapment as a matter of law.

II.

The petitioner was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment because the trial court failed to sever Martinelli when it was clear that evidence admissible

against only Martinelli was severely prejudicial to Stavola, and because the court failed to distinguish between petitioner's conduct and that of Martinelli in its instructions.

Stavola's defense was based upon two theories of entrapment. First, that Sweeney entrapped him on February 25, 1971, when Sweeney said he would make a deal with the judge and the prosecutor. Second, he was entrapped by Martinelli who, as Sweeney's agent, conveyed the fact that Sweeney would make a "deal" for him. As to both aspects of his entrapment defense, it was crucial to prevent the conversations of Martinelli and Sweeney, properly admissible only against Martinelli, from being considered in determining Stavola's guilt or innocence.

(a)

This Court has recognized that when there is a joint trial, there is danger that the adverse evidence against some defendants will improperly rub off on the co-defendants. In *Blumenthal* v. *United States,* 332 U.S. 539, 559-560 (1947), the Court stated "Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions are insufficient to ward off the danger entirely. It is therefore extremely important that these safeguards be made as impregnable as possible." In *United States* v. *Kelley,* 349 F.2d 720 (2nd Cir. 1965), where the evidence against defendant, Shuck, in a stock fraud case was less extensive and incriminating than against his co-defendants, the Court held that Shuck was prejudiced by the introduction of evidence against the co-defendants which "must have stamped

them [co-defendant] in the eyes of the jurors as unscrupulous swindlers of the first rank", 349 F.2d at 759.

The same danger that arose in *Kelley* arose in the instant case. On October 29, 1970, Martinelli initiated conversation with the New Jersey State Troopers about helping Stavola with the problem of his indictment for assault and battery. (II. Tr. 43-44). Martinelli arranged to have Sweeney meet Stavola on December 18, 1970 (III. Tr. 527). Martinelli by his own admission called Sweeney ten to fifteen times in January and February, 1971, to find out what progress Sweeney was making and he met with Sweeney on February 23, 1971. (IV. Tr. 873). During these conversations, none of which were admissible against Stavola, Martinelli offered to fix future cases with Sweeney (IV. Tr. 990-991), and to become a "bag man" (IV. Tr. 994). These tape recorded statements were played for the jury. It is clear from these statements the jury could only infer that Martinelli's impetus to engage in future case-fixing activity came from his "fixing" this case. This clear indication of Martinelli's predisposition had to rub off on Stavola.

The prosecutor brought out on cross-examination of Martinelli the fact that he knew Frank Mallamaci who had been indicted in a widely publicized trial for bribery (IV. Tr. 973-977). The fact of Martinelli being associated with Mallamaci and Joe Zicarelli, equally notorious, was not relevant to any of the charges against either Stavola or Martinelli and it was not admissible against Stavola. The court instructed the jury not to consider the references to Martinelli's knowledge of the Mallamaci indictment in determining Stavola's guilt. (IV. Tr. 988). These references

marked Martinelli as an unscrupulous briber. Here, as in *Kelley,* the evidence properly admissible against Martinelli alone rubbed off on Stavola, improperly prejudicing him.

(b)

Petitioner's defense was that of entrapment. Indeed, it was the crucial issue in the case because it was never denied that Stavola had handed Sweeney $5,000. Since it was the basic issue in the case it was particularly important that the instructions to the jury were clear and unequivocal. *United States* v. *Silver,* 457 F.2d 1217 (3rd Cir. 1972). One aspect of Stavola's entrapment defense was that he had been entrapped by Sweeney using Martinelli as his agent. He requested an instruction to that effect.[3] The instruction was not given. The evidence showed that Sweeney used Martinelli to contact and arrange meetings with Stavola. With the exception of the meeting of February 26, 1971, all meetings between Sweeney and Stavola were set up by Martinelli. The tape recordings contained statements by Martinelli that he was in effect acting as an agent of Stavola. The court instructed that agency could not be established only by statements of the agent, but must be determined on all the facts (V. Tr. 312-313). However, the court did not instruct that Martinelli could also have been acting as an agent of Sweeney. Thus the jury was only instructed on the prosecution's theory of agency and was never allowed to consider one aspect of Stavola's theory of defense which was supported by the evidence. The jury could have found that Martinelli was Sweeney's agent for soliciting a bribe. This would have been sufficient

[3] See fn. 1.

to establish the defense of entrapment. The trial judge's refusal to give the requested instruction constituted error. *Lufty* v. *United States,* 198 F.2d 760 (9th Cir. 1952), *Levine* v. *United States,* 261 F.2d 747 (D.C. Cir. 1958).

The trial judge's failure to give Stavola's requested instructions combined with the evidence admitted solely against Martinelli, which severely prejudiced Stavola, denied Stavola a fair trial within the meaning of the due process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Exhibit A

Not For Publication Without the Approval of the Committee on Opinions

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1208-71

STATE OF NEW JERSEY, *Plaintiff-Respondent*

v.

MICHAEL J. STAVOLA, *Defendant-Appellant*

A-1235-71

STATE OF NEW JERSEY, *Plaintiff-Respondent*

v.

JOSEPH MARTINELLI, *Defendant-Appellant*,

Argued July 9, 1973—Decided Aug 3 '73

Before Judges MINTZ, LORA AND ALLCORN.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County.

Mr. Justin P. Walder argued the cause for appellant Michael J. Stavola (Messrs. Schapira, Steiner & Walter, attorneys; Mr. Jeffrey B. Cahn and Mr. Robert E. Knowlton, on the brief).

Mr. Paul J. Feldman argued the cause for appellant Joseph Martinelli (Mr. Charles Frankel, attorney.)

Mr. John DeCicco, Deputy Attorney General, argued the cause for respondent State of New Jersey (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney; Messrs. Robert E. Genatt, Leonard E. Pessin and Mart Varrsi, on the brief.)

PER CURIAM

At oral argument the court *sua sponte* ordered the consolidation of the above captioned appeals. Defendants appeal their convictions after a jury trial on an indictment returned by the State Grand Jury and filed May 17, 1971. The four count indictment charged defendants Stavola and Martinelli with:

I. Conspiracy (a) to induce Detective Sweeney of the State Police to corruptly intercede on behalf of defendant Stavola in a criminal prosecution then pending against Stavola, such intercession constituting misconduct in office, (b) to offer a bribe to Detective Sweeney, and (c) to obstruct justice with regard to the aforementioned criminal prosecution, all in violation of *N.J.S.A.* 2A:98-1 and 2A:98-2.

II. Attempting to induce Detective Sweeney to engage in misconduct in office by interceding on behalf of defendant Stavola in a criminal prosecution then pending against Stavola, in violation of *N.J.S.A.* 2A:85-1, 2A85-5, and 2A:85-14.

III. Offering a bribe to Detective Sweeney, in violation of *N.J.S.A.* 2A:85-1 and 2A:85-14; and

IV. Obstructing justice by endeavoring to persuade Detective Sweeney to corruptly intercede in the aforementioned prosecution, in violation of *N.J.S.A.* 2A:85-1 and 2A:85-14.

The jury was unable to reach a verdict on count I (conspiracy) as to both defendants, and as to count II (inducing misconduct in public office) as to defendant Stavola. Defendant Stavola was found guilty on counts III and IV. Defendant Martinelli was found guilty on counts II, III and IV. Stavola was sentenced to State Prison for one to two years on each of counts III and IV, but sentence was suspended on count IV. Martinelli was sentenced to one

to two years on each of counts II, III and IV, but sentence was suspended on counts III and IV.

The backdrop to this case is an indictment previously returned by the Monmouth County Grand Jury on September 1, 1970 against defendant Stavola for assault and battery upon a police officer and obstructing a police officer in the execution of his official duties. The indictment under which defendants were convicted on some of the counts, which are the subject of this appeal, concerns an alleged attempt by defendants to unlawfully influence the prosecution of the Monmouth County indictment.

Stavola makes the following contentions:

(1) The trial judge erred in failing to direct a verdict of acquittal as a matter of law on the basis of the defense of entrapment both before and after the case was submitted to the jury.

(2) The trial judge erred in refusing Stavola's requested charge that the jury may consider the actions of Martinelli as being the actions of an agent of the government with respect to Stavola's defense of entrapment.

(3) The trial judge erroneously and prejudicially limited the instruction on entrapment to the conspiracy count thereby denying Stavola his right to have the jury consider this defense as to all counts of the indictment.

(4) The issue of entrapment should have been treated as solely the province of the trial court and a judgment of acquittal should have been entered.

(5) The trial judge erroneously failed to properly instruct the jury that the State had the burden to prove beyond a reasonable doubt that Stavola was not entrapped into the commission of the offenses of which he was convicted.

(6) The trial judge erroneously refused to grant Stavola a judgment of acquittal on the bribery charges in count three.

(7) The trial judge erroneously refused to grant Stavola a judgment of acquittal on the charge of obstruction of justice in count four.

(8) The trial judge irreparably prejudiced Stavola by permitting improper examination of character witnesses.

(9) The trial judge prejudicially violated Stavola's Sixth Amendment rights to cross-examine and confront witnesses against him.

(10) Prejudicial error was committed when the jury was allowed to use transcripts of tape recorded conversations.

(11) The trial judge's charge to the jury was misleading, erroneous and incomplete.

(12) The prosecutor's summation was unduly prejudicial thereby denying Stavola a fair trial.

(13) Refusal of the trial judge to sever the trial of Stavola from that of co-defendant Martinelli irreparably prejudiced Stavola.

(14) The one to two year custodial sentence is manifestly excessive.

Martinelli makes the following contentions:

(1) Count two of the indictment fails to set forth a crime.

(2) The court's instruction on count two failed to advise the jury of the nature of the offense.

(3) The trial judge prejudiced defendant by permitting improper cross-examination of character witnesses.

(4) Numerous trial errors require a reversal.

(5) The custodial sentence is manifestly excessive.

(6) Entrapment.

The State's evidence may be summarized as follows: On October 5, 1970 Detective Edwin R. Fourre of the New Jersey State Police was at the Coach Restaurant in Union City. As he pulled into the parking lot he observed one Frank Mallamachi, whom he knew. He engaged in conversation with Mallamachi. Mallamachi then introduced Detective Fourre to Martinelli, who was also in the parking lot. During the course of conversation with Fourre, Martinelli explained that his employer at Trap Rock Industries, Michael Stavola, was in trouble, charged with assaulting a police officer. Martinelli asked Fourre whether he could help Stavola in any way. Fourre testified that he answered negatively. He reported the incident to his superior.

Detective James Sweeney of the State Police was the principal figure in the alleged attempt by the co-defendants to influence the prosecution of Stavola on the assault and battery indictment. Sweeney testified that he first met and spoke with defendant Martinelli in October 1970 when he and Fourre were at the Coach Restaurant. Sweeney was again at the Coach Restaurant on December 17, 1970. Martinelli approached him and began talking about his employer, Stavola. Martinelli characterized Stavola as one of the greatest guys he had ever met and a fantastic boss. He then said he was very sorry about the problem his boss was in, in Mommouth County. Martinelli said that if anyone could help Stavola get out of this problem, he could "write [his] own ticket." Martinelli stated that he would like Sweeney to meet Stavola, and if he could meet Stavola the following day for lunch, he should call Martinelli at one of two numbers.

The substance of the subsequent conversations between the co-defendants and Sweeney can best be obtained from the tapes. The transcripts of eight conversations were re-

corded on tape through the use of electronic surveillance equipment secreted on the person of Detective Sweeney and in his automobile. The transcripts were prepared by the State Police from the tapes. Portions of the tapes that were indiscernable were described as "inaudible" on the printed transcripts. After preliminary transcripts were prepared, Palmer Herbert, Captain of Detectives in the Ocean County Prosecutor's Office, listened to the tapes and inserted in certain of the "inaudible" spaces the words which he believed the context called for.

Sweeney testified that he called Martinelli at the Black Angus Restaurant on the evening of December 17, 1970. A tape of the conversation was played for the jury. Martinelli stated that he could not find Stavola, hence Sweeney should call again the next morning. A portion of the conversation as transcribed was as follows:

> MARTINELLI: No listen, if you could do something on that old buddy, I'll light a candle for you every morning.
>
> SWEENEY: Well.
>
> MARTINELLI: I'm going to try to set this up, you know on Rt. 1 there.
>
> SWEENEY: All right.
>
> MARTINELLI: You know what I'm talking about.
>
> SWEENEY: Yeah.

Sweeney called Martinelli the next morning, December 18, 1970, as planned. A tape of this phone call was played for the jury. As a result of that conversation Sweeney went on the afternoon of December 18, 1970 to the Carriage House Restaurant in North Brunswick. Sweeney met Martinelli in the cocktail lounge. Stavola was at the far end of the bar. After conversing for a time, Martinelli brought Sweeney to where Stavola was sitting, and introduced Sweeney to Stavola. Sweeney talked with Stavola in a hallway for a time, and Stavola then left. Sweeney thereafter continued his conversation with Martinelli.

The December 18, 1970 conversations were taped. In their preliminary conversation Martinelli told Sweeney that he told Stavola that he (Sweeney) was "with the confidential squad or something like that, (inaudible) you know your way around." Thereafter, in the course of the conversation of Sweeney with both Stavola and Martinelli, Stavola explained his version of the incident upon which the assault and battery indictment was based. He expressed the view that the complaining officer was lying, blowing the matter out of proportion, and that if that officer told the truth his problem would be resolved. He further stated that some influential person tried to intercede for him at the county level but that he did not ask him to do so. A further portion of the tape as transcribed is as follows:

> SWEENEY: * * * I can't promise you nothing, that's all I can say.
>
> STAVOLA: That's all you can say.
>
> MARTINELLI: Mike, Mike, I told him whatever it is let me know, you know what I'm talking about.
>
> STAVOLA: It's just half assed all the way down the line but it's gotten to the stage (laugh)
>
> SWEENEY: Look you've gotten to the stage right now where your (sic) going to have to do something.
>
> STAVOLA: All right.
>
> SWEENEY: Is it alright with you, with the arrangements I made with him then?
>
> STAVOLA: Whatever
>
> MARTINELLI: I told him whatever it is let me know.
>
> STAVOLA: Yeah.

No contact was made between Sweeney and defendants during the period from December 18, 1970 to January 7, 1971. Sweeney testified that on the latter date he received a telephone call from Martinelli. This call was not taped. Martinelli had just returned from Florida. He said he had called to determine what progress had been made in at-

tempting to help Stavola fix the case. Sweeney told Martinelli he was making progress. There were no conversations between Sweeney and either defendant during the period from January 7, 1971 to January 23, 1971.

Sweeney further testified that on January 23, 1971 he received a call from Martinelli but he told Martinelli that he could not talk at that time. Martinelli had wanted to know whether any more progress had been made in attempting to fix the case.

On February 12, 1971 Sweeney received a call at his home from Martinelli. Sweeney told Martinelli that things were looking good, and he requested a meeting with Martinelli and Stavola.

On February 23, 1971 Sweeney again received a call from Martinelli. This call was taped. During the course of this conversation Martinelli reveals for the first time an interest in personally benefiting monetarily from this deal. They agreed to meet later that day at the Carriage House.

A tape was made of the February 23, 1971 meeting between Sweeney and Martinelli at the Carriage House. This tape reveals that Martinelli and Stavola had "had words" around Christmas time because Martinelli had not received a Christmas bonus. Martinelli told Sweeney that the money would come from Stavola, Stavola knew this, and that Stavola had sent Martinelli to Sweeney. It should be noted also that there was testimony that Martinelli's employment by Stavola's company was terminated in December 1970.

Sweeney and Martinelli met again outside the Carriage House Restaurant on February 25, 1971. This conversation was taped. Martinelli appears to be prompting Sweeney to impress Stavola with the seriousness of the situation—"* * * say * * * the cops out there want to hang you Mike * * *,"—but this prompting again appears

to be the result of Martinelli's desire to jack the price up so that he and Sweeney could skim a profit out of the deal. This is apparent from the conversation between Sweeney and Martinelli at the outset of their meeting, at which time they discussed how much they could get away with charging Stavola.

Martinelli went into the Carriage House and returned with Stavola. Sweeney impressed Stavola with the seriousness of Stavola's situation—"* * * there's two things you got to worry about * * * number one you're an Italian, number two you're successful * * *;" "Your lawyers have probably told you this already, if found guilty, no less than 2, no more than 7 and a $2000 fine, that's what the statute reads." The remainder of the conversation between Sweeney and Stavola was not recorded, but Sweeney testified that Stavola asked him what it would cost and arrangements were made to meet the next day, February 26, 1971, at Holiday Inn in Princeton.

The February 26 meeting at the Holiday Inn was recorded. Sweeney and Stavola discussed the pay-off, the need for confidentiality, and "front money." During the course of the conversation Stavola, in an attempt to assure Sweeney that his word was good, implies that he had previously entered into a number of "deals," stating that he had performed different jobs and that "* * * they cross a few bucks here and there, it's a way of life and I'd rather have it, like with me and you * * *." A further portion of that conversation is as follows:

> SWEENEY: Well, the only thing that I suggested to them [the hypothetical recipients of the pay-off], and first of all they wanted too much and I'm gonna be honest with ya, so I told them this, the guy is not gonna put anything up front without a guarantee of something, the guy down there says well the guy isn't gonna move because they've been burned before.
>
> * * * * * * * * * *

STAVOLA: I couldn't begin to mention names to you, but all I got to say to you is that my word is my bond * * *.

SWEENEY: They said at least half * * *.

* * * * * * * * * *

STAVOLA: * * * they only know me as Mike Stavola and nothing else and I couldn't begin to tell ya of my other deals that I've had and other than my word is my bond, I'll tell ya, what I'll do with ya before I leave tonight I'll give you 5.

Sweeney and Stavola next met as planned on the evening of February 26, 1971 at the Colts Neck Inn. The conversation was recorded. Very little was said. It was clear from the conversation, however, that Stavola handed Sweeney $5000.

Stavola did not testify. However, Martinelli testified regarding his initial contacts with Fourre and Sweeney. He confirmed meeting with Fourre on October 5, 1970 in the parking lot of the Coach Restaurant and saying to Fourre: "Gee, I wonder why that thing can't be downgraded or anything like that. Do you know anything about things like that?"

Martinelli further stated that he first met Sweeney accompanied by Fourre on October 29, 1970 at the Coach Restaurant, and that Sweeney approached him when he was alone. He indicated that the conversation consisted of Sweeney's statement: "Gee, things like that are tough to get downgraded, but let me check into it. I'll see what it's all about."

Martinelli also said that he did not talk to or see Sweeney again until December 17, 1970 when Sweeney walked into the Coach Restaurant and Martinelli was sitting at a table. He said Sweeney started a conversation with him and stated that he had checked but nothing could

be done, Stavola was in a lot of trouble, and that he stood to get two to seven years because the offense was a "double felony." Martinelli said he responded by stating that, "If there is anything you feel you could do * * * he would really repay you." Martinelli testified that he did not tell Stavola that he met with Sweeney on the two above dates.

At the close of the proofs several motions were made by counsel for defendant Stavola in which defendant Martinelli joined. Defendant Stavola's motion for a judgment of acquittal on the ground that as a matter of law he was entrapped was denied. He renewed his motion made at the outset of the trial for a severance. Finally, defendant moved for dismissal of each of the separate counts of the indictment. The court denied the respective motions.

We will first consider the merits of defendant Stavola's appeal. Clearly his major contention is entrapment. In *State* v. *Dolce,* 41 *N.J.* 422, 430 (1964), the court stated:

> Entrapment exists when the criminal design originates with the police officials, and they implant in the mind of an innocent person the disposition to commit the offense and they induce its commission in order that they may prosecute. *Sorrells* v. *United States,* 287 *U.S.* 435, 442, 53 *S.Ct.* 210, 77 *L.Ed.* 413, 417 (1932). It occurs only when the criminal conduct was the product of the creative activity of law enforcement officials. *Sherman* v. *United States,* 356 *U.S.* 369, 372. 78 *S.Ct.* 819, 2 *L.Ed.*2d 848, 851 (1958).

To same effect see *United States* v. *Russell,* *U.S.* , 36 *L.Ed.*2d 366 (1973). This does not mean that police officials may not afford opportunities for the commission of criminal offenses. "Artifice and strategem, traps, decoys and deceptions may be used to obtain evidence of the commission of crime or to catch those engaged in criminal enterprises. Such devices are necessary weapons in the ever present war on crime and criminals." *Dolce,* at 431. When

a defendant interposes the defense of entrapment the State may present proof of his predisposition to commit the crime. The purpose of such evidence is to indicate that defendant was not an innocent person who would not have committed the offense were it not for the inducement of the police officers. Predisposition may be evidenced by prior conviction of crime, ready compliance with minimal inducement or easy yielding to the opportunity to commit the offense. *Dolce*, at 433.

Our review of the testimony impels the conclusion that the trial judge properly denied a judgment of acquittal and that the issue of entrapment was correctly left to the jury for determination. While the criminal design may have originated with Martinelli that design was clearly adopted by Stavola on December 18, 1970. *United States* v. *Klosterman*, 248 *F.*2d 191 (3rd Cir. 1957), relied upon by defendant, is factually distinguishable. In *Klosterman*, at 195, it appears that defendant abandoned his original criminal plan but "overzealous tactics of the law-enforcement agents * * * [created] a criminal out of a man who had abandoned his criminal intent * * * *" In such circumstances the court found entrapment as a matter of law. In the case before us there is no evidence indicative of Stavola's abandonment of his criminal design.

Nor do we find any merit in the contention that a judgment of acquittal should have been entered after the jury failed to find guilt on the conspiracy charge. Defendant may be found guilty for substantive offenses without a finding of guilt on the conspiracy count. *State* v. *Still*, 112 *N.J.Super.* 368 (App.Div.1970); *United States* v. *Allard*, 458 *F.*2d 1136 (3d Cir.1972).

Secondly, the contention that the trial judge erred in refusing to instruct the jury that it might consider Martinelli as the agent of the government with respect to the defense of entrapment lacks merit. The testimony clearly indicates that Martinelli originated the criminal design in

October 1970; he was not acting on behalf of the State Police. *Cf. United States* v. *Romano*, 278 *F.*2d 202, 204 (2nd Cir. 1960). Martinelli's criminal activity was adopted by Stavola no later than December 18, 1970, and was never thereafter abandoned by him. Hence the trial judge properly refused the requested instruction.

The charge on entrapment was given following the court's instruction on the conspiracy count. The court then proceeded to charge the jury on the remaining three substantive counts in the indictment. Defendant contends that this sequence in the instructions deprived him of his right to have the jury consider his defense of entrapment on all counts of the indictment. The entrapment charge was couched in general terms. Near the conclusion of its charge on entrapment the court stated:

> Now, entrapment can be proved during the State's case or the defendant can adduce evidence. It is raised by the defendant. And the issue of entrapment in this case is left to you for your determination as to each particular defendant in this case, Stavola and Martinelli. And the defendant is entitled to a verdict of not guilty unless the State has satisfied you beyond a reasonable doubt that the defendant committed the crime charged and he was not entrapped into doing so by police officials.

The defense of entrapment permeated the entire case. The acid test is whether the jury was misled by the charge which must be construed as a whole. *Moich* v. *Passaic Terminal & Construction Co., Inc.*, 82 *N.J.Super.* 353, 370 (App.Div.1964). In the circumstances here presented we do not believe that the jury was misled by the positioning of the entrapment charge.

While various code revision commissions and committees have suggested that the issue of entrapment should be decided by the court, the decisional law indicates that the

question is an issue to be decided by the jury. *Sorrells* v. *United States*, 287 *U.S.* 435 (1932); *United States* v. *Russell, supra.* In *State* v. *Dolce, supra*, at 433, the court in dictum indicated that the issue of entrapment is usually resolved by the jury "like any other defense," although it declined to rule on the question since it was not raised as a ground of appeal. We find no error in the submission of this issue to the jury.

The trial judge specifically charged the jury that as to each particular defendant, Stavola and Martinelli, that defendant is entitled to a verdict of not guilty unless the State "has satisfied you beyond a reasonable doubt that the defendant committed the crime charged and he was not entrapped into doing so by police officials." There is no merit to defendant's fifth contention.

The trial judge, contrary to defendant's assertion, properly refused to grant Stavola a judgment of acquittal as to the bribery charges in count three. Initially, he contends that the indictment failed to charge the common law crime of bribery. Suffice it to say that the indictment lists the essential facts constituting the offense charged. *R.* 3:7-3. The argument is devoid of merit. It is not necessary that the act requested be one which the official has authority to do. It is sufficient if he has *apparent* ability to bring about or *contribute* to the desired end. *State* v. *Begyn*, 34 *N.J.* 35 (1961); *United States* v. *Carson*, 464 *F.*2d 424 (2d Cir. 1972), *cert.* den. *U.S.* , 93 *S.Ct.* 268, 34 *L.Ed.* 2d 219 (1972). Finally, we find no error in connection with the bribery charge to the jury. It clearly explained the crime of common law bribery.

We likewise find no substance to defendant's contention that the trial judge erred in failing to grant a judgment of acquittal on count four of the indictment. Here, again, the sufficiency of the indictment is challenged. The indictment sufficiently described the acts committed by defendants, which constituted common law obstruction of justice

contrary to *N.J.S.A.* 2A:85-1. *State* v. *Cassatly*, 93 *N.J. Super.* 111, 118 (App.Div.1966), certif. den. 48 *N.J.* 448 (1967). Furthermore, the proofs fully supported the charge.

We reject defendant's eighth contention that the trial judge irreparably prejudiced Stavola by permitting improper cross-examination of the character witnesses. Assuming the impropriety of that cross-examination the trial judge emphatically gave a curative instruction to the jury to disregard the same, which completely precluded the possibility of prejudice to defendant. We note that one character witness was asked on cross-examination whether she had ever heard that Stavola was convicted in 1964 of obstructing elections. An objection was voiced to the question which was not answered. Out of the jury's presence the court ruled that because a certified copy of the conviction was not in court the question could not be asked. Now for the first time on appeal defendant argues that his conviction was reversed in a trial *de novo* in the County Court, a fact then obviously known to him. However, defendant did not advise the court of this fact, and did not request any curative instruction. He cannot take advantage of an error which he could readily have avoided at trial. *State* v. *Macon*, 57 *N.J.* 325 (1970).

We do not find that the cross-examination of Sweeney was unduly curtailed. Many of the questions propounded to Sweeney were irrelevant or disallowed by the trial judge pursuant to his discretion under *Rules of Evidence* 4.

Defendant contends that prejudicial error was committed when the jury was permitted to use transcripts of tape recorded conversations. The transcripts were not introduced into evidence. Rather they were distributed to the jury, as visual aids. The court reiterated several times to the jury in the course of the trial that the tapes were the evidence, that the transcripts were only aids, and that the jurors were to decide for themselves what was said on the tapes. The use of such transcripts is within the discretion

of the trial judge, and we fail to perceive any abuse of such discretion. *State* v. *Armellino*, 122 *N.J.Super.* 225, 239 (App.Div.1973).

Defendant argues that the trial judge's charge to the jury was misleading, erroneous and incomplete. In this connection he asserts that the charge on entrapment was erroneous. It was not. It properly and adequately set forth the law enunciated in *State* v. *Dolce, supra.*

Although the trial judge stated that he would instruct the jury that the State's witnesses were not on trial, and whether they were in fact guilty or innocent was not an issue but that credibility was, he failed to give such instruction. Nevertheless, during the course of his charge he told the jury that the resolution of the credibility of the witnesses was its function. We deem this general instruction on credibility entirely adequate, and that it was unnecessary to charge that the State's witnesses were not on trial. Obviously they were not.

Furthermore, we cannot fault the trial judge on his instruction to the jury respecting testimony of defendant's character or reputation. It was adequate and proper.

Defendant contends that the trial judge erred in failing to charge the jury concerning the sentencing requirements with respect to a conviction for assault and battery upon a police officer. Sweeney, in his conversations with defendants, exaggerated the extent of the sentence which Stavola would be exposed to on a conviction for assault and battery upon the police officer. While the trial judge failed to charge the jury the statutory sentencing limit on such a conviction, he did instruct the jury that sentencing was a matter for the court to impose. Furthermore, as earlier noted herein, traps and deceptions may be used to obtain evidence of the commission of crime or to catch those engaged in criminal enterprises.

On several occasions during the trial the court instructed the jury that the conversations between Martinelli and Sweeney could only be used as evidence against Stavola if it was first determined that a conspiracy existed. In the course of his charge to the jury he briefly again alluded to this principle of law. In these circumstances we are satisfied that the jury was fully apprised of the appropriate rule.

We have considered the several other objections to the charge taken by defendant as set forth in his brief and find that they are devoid of merit. The charge when viewed in its entirety properly instructed the jury on the applicable law in light of the understanding that would be derived by ordinary men and jurors in relation to the evidence before them and the circumstances of the trial. *State* v. *Janiec,* 11 *N.J.* 397, 401 (1953).

We do not agree with defendant's contention that the prosecutor's summation was unduly prejudicial. We concur with the prosecutor that his plea for vindication of Sweeney, the reference to Sweeney being "on trial" and his statement that he was in a sense "defense counsel" were merely a reference to the conflicting testimony and a plea that Sweeney's, rather than the defense witnesses', was the testimony to be believed.

Defendant asserts that the prosecutor in his summation took the $5,000 which was in evidence, slipped it into his pocket while talking about dealing with the police and referred to the fact that if Sweeney had been a corrupt policeman he could have kept the same. Defendant argues that the court may take judicial notice that at the time of trial the news media widely publicized reports concerning police corruption as revealed by the Knapp Commission in New York City, and it was against this background that the prosecutor made this remark. Following summation a motion for a mistrial, based upon this statement was

made, and properly denied. One of the basic issues in the case was the charge of bribery. Furthermore, both defense counsel in summation attacked Sweeney's honesty and integrity. In these circumstances we believe that this comment by the prosecutor was within the bounds of fair comment. *Cf. State* v. *Knight*, *N.J.* (1973).

We further find that the comment of the prosecutor regarding his role was entirely proper. In brief, the prosecutor's summation did not exceed the bounds of fair comment on the evidence.

Stavola had been denied a pretrial motion for severance, and several such motions were made and denied during the trial. As a consequence Stavola urges that he suffered irreparable prejudice.

In this respect he refers to the summation of Martinelli's counsel wherein he made reference to the fact that Martinelli testified in his own behalf, and that such a reference unfairly raised in the jury's mind the fact that Stavola did not take the stand. However, the state contends that this remark was directed solely to the credibility of Martinelli. We do not believe that it in any way reflected on Stavola's decision not to testify. Stavola has failed to demonstrate that his right to remain silent has been violated. *State* v. *Sinclair, et al*, 49 *N.J.* 525, 548, 549 (1967).

The granting of a motion for severance is discretionary with the trial court. Denial of such a motion will not warrant a reversal unless it is clearly shown that the trial court's action constituted an abuse of discretion. *State* v. *Yormark*, 117 *N.J.Super.* 315, 331-332 (App.Div.1971), certif. den. 60 *N.J.* 138 (1972), *cert.* den. 407 *U.S.* 925 (1972). Here, as in *Yormark*, the conspiracy and the substantive charges against Stavola and Martinelli arose out of the same criminal transaction. The court was careful throughout the trial to instruct the jury, where appropriate, that evidence could only be used against one or the other de-

fendant. We find no abuse of discretion on the part of the trial judge in the denial of the several motions for a severance.

Finally, we have reviewed the presentence report, and are mindful of Stavola's prior clean record. Nevertheless, the offenses for which he was convicted are reprehensible. We find no abuse of discretion on the part of the trial judge in imposing a custodial sentence for the stated term. It was not manifestly excessive.

Martinelli's contention that the indictment pertaining to count two, attempting to induce misconduct in office, fails to set forth a crime, is frivolous. The duties of Detective Sweeney and defendant's attempt to induce Sweeney to intercede in Stavola's behalf in connection with the pending prosecution against Stavola are adequately detailed in that count. *Cf. State* v. *Cohen*, 32 *N.J.* 1 (1960). The proofs abundantly supported this charge.

We have examined the trial court's instructions regarding count two, and the charge in its entirety, and conclude that it properly informed the jury of the nature of the offense.

Martinelli relies upon Stavola's brief in urging that numerous trial errors mandate a reversal. As already noted, we have found to the contrary.

Some of his contentions regarding improper cross-examination of character witnesses were considered by us in the Stavola appeal and need not here be repeated. Additionally, he argues that a character witness was asked whether he had ever heard that Martinelli offered to be a "bag man". The question was improper, and the objection to the same sustained. The court further instructed the jury that the questioning pertaining "to this alleged crime" was improper, and that it should be disregarded. This curative instruction alleviated any prejudicial error in

connection with the improper cross-examination of character witnesses.

Finally, we have reviewed Martinelli's presentence report and find no prior criminal record. We make the same observations here as we did in connection with Stavola's custodial sentence. Martinelli's custodial sentence on the three counts was not manifestly excessive.

The convictions of defendants Stavola and Martinelli are affirmed.

A True Copy

MORTIMER G. NEWMAN, JR.
Clerk

EXHIBIT B

SUPREME COURT OF NEW JERSEY

C-117 September Term, 1973

STATE OF NEW JERSEY, *Plaintiff-Respondent,*

v.

MICHAEL J. STAVOLA, *Defendant-Petitioner*

On Petition for Certification

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied.

WITNESS the Honorable Pierre P. Garven, Chief Justice, at Trenton on the 2nd day of October, 1973.

/s/ FLORENCE R. PISKOE
Florence R. Piskoe
Clerk of the Supreme Court

EXHIBIT C

SUPREME COURT OF THE UNITED STATES

No. A-622

MICHAEL J. STAVOLA, *Petitioner*

v.

NEW JERSEY

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 15, 1974.

/s/ WILLIAM J. BRENNAN, JR.
William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 20
day of December, 1973.

EXHIBIT D

Tape Recorded Conversation February 23, 1971

MARTINELLI: Mike, you met Jim.

STAVOLA: Yeah.

SWEENEY: Mr. Stavola, how are you?

STAVOLA: Pretty good.

MARTINELLI: They're screwing up the works with Traffic for Christsakes its a State Trooper.

SWEENEY: Yeah, I know.

Unidentified male: (*inaud*) should bring this car (*inaud*)

STAVOLA: (*Inaud*) pull right here until he gets out.

SWEENEY: He's right behind us.

STAVOLA: Oh.

MARTINELL: You been working late.

SWEENEY: I told you, I been in the office all week and tonight we had a meeting and I had to go up to New Brunswick station and drop the guys checks off, today's pay day.

MARTINELLI: Oh.

MARTINELLI: You want me to start the conversation?

SWEENEY: (*Inaudible*)

MARTINELLI: Mike, I trust him, he trusts me, he wants to know if he can trust you, you want to know if you can trust him. Jim is all right, I can tell you that, I'll take full responsibility, anything you want to talk about, you talk about it.

SWEENEY: Let me say this on the out set Mr. Stavola, it's nothing personal at you when I say, I don't trust you, understand what I'm saying now.

STAVOLA: Yeah.

SWEENEY: It's nothing I have against you personally but, I got a lot to lose and so do you, really, you know, if we were ever found out about this shit but ah, Joe, came to me and he was speaking for you, I've done this so far I've gotten to somebody within the confines Monmouth County Court House system and the thing that can be worked, first of all let me say this to you, Joe McCarthy

and the cop cannot be touched, number two they got a hard on for you, number three, the town has got a hard on for you, from what I could find out.

MARTINELLI: Fucking papers don't do any good either.

SWEENEY: Yeah, theres two things you got to worry about one is a jury, number one you're an Italian, number two you're successful and they put two and two together right away and as I understand it the guy that was going to handle the prosecution was gonna go on this theme, in other words ah, attack your character so to speak.

STAVOLA: Right.

SWEENEY: A deal can be made through the first individual who I'm not going to tell you who he is, I want that understood too, that there can be a specific prosecutor to handle your case before a specific judge you do definitely have to stand trial, there is no way in hell because of the guy that wrote the complaint and now has been presented before grand jury, that you can get out of a court trial, it's not an impossibility. But if it was done that way, the Attorney General would be down, right down the prosecutor's neck, the prosecutor's neck and he would not stand for it, so it's gotta be done in that way, you're gonna have to stand the trial. Your lawyers have probably told you this already, if found guilty, no less than 2, no more than 7 and a $2,000 fine, that's what the statute reads.

STAVOLA: Okay.

MARTINELLI: (*inaud*) know anything about this?

SWEENEY: Well, that's another thing, your lawyer doesn't know anything if you agree to this.

MARTINELLI: If they win the case Mike, let them feel that they won it, you know what I mean.

SWEENEY: He does not get wind of this at all, that's got to be one of the stipulations, or else I get, I'll leave right now.

MARTINELLI: No, no, no ah look ah, you talk to this out. Hey, Mike if you feel, if you feel this is no good, say look, I want no part of it, if you think it's something good, don't

be afraid to talk about it. Jim's all right, that's all I got to tell you. You want me to walk out of here and the two of you talk?

MARTINELLI: Mike, it's up to you.

SWEENEY: Maybe it'd be better, Joe.

MARTINELLI: Yeah.

MARTINELLI: All right.

STAVOLA: Mart, you sit there, we'll take a walk.

MARTINELLI: Close your door, close your door Jim. Pause approximately 12 minutes

STAVOLA: (*Inaudible*) we'll walk.

SWEENEY: Joe, talk it easy.

MARTINELLI: All right.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1110

MICHAEL J. STAVOLA,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 30-3, Respondent, the State of New Jersey, respectfully submits, in addition to Petitioner's Statement of the Case, the following factual recitation in order to present an accurate and concise view of the matter involved herein.

Petitioner, Michael J. Stavola, was indicted by the Monmouth County Grand Jury on charges of assault and battery on a police officer and obstructing a police officer in the execution of his official duty. The convictions, which are the subject matter of the within petition, are the result of an attempt to influence the prosecution of the aforementioned indictment.

Petitioner Stavola and co-defendant Joseph Martinelli were indicted by the State Grand Jury and charged with the offenses of conspiracy, attempting to induce a State Police Officer to engage in misconduct in office bribery of said

State Trooper and obstruction of justice. Petitioner Stavola was found guilty of bribery and obstruction of justice and acquitted on the remaining counts. The jury also found co-defendant Martinelli guilty of inducing misconduct in office, as well as bribery and obstruction of justice.

Petitioner does not controvert the fact that he gave a New Jersey State Trooper $5,000 in order to influence the outcome of the then pending indictment charging assault and battery and interference with a police officer. Rather, it is claimed that Petitioner's alleged entrapment defense entitled him to an acquittal as a matter of law. Indeed, it is here asserted that the police conduct was so outrageous as to constitute a violation of due process. The facts of this case belie such a contention.

Detective James Sweeney of the New Jersey State Police was the central figure in Petitioner's attempt to influence the outcome of the pending criminal litigation. Sweeney's first inkling of what was to transpire occurred during a conversation with co-defendant Martinelli on December 17, 1970. During that conversation Martinelli euologized co-defendant Stavola. Martinelli informed Sweeney that if anyone could help Stavola he would be able to "write (his) own ticket."

Subsequent to this conversation, Trooper Sweeney was equipped with an on-body recording device and other recording equipment in order to preserve the substance of later conversations between himself, Petitioner Stavola and Martinelli.

On the evening of December 17, 1970, Sweeney conversed by telephone with Martinelli. During this conversation Martinelli indicated, "No listen, if you could do something on that old buddy, I'll light a candle for you every morning."

Martinelli introduced Sweeney to Petitioner Stavola on the following day, December 18, 1970, at a restaurant located in North Brunswick, New Jersey. Martinelli allegedly informed Stavola that Sweeney was "with the confidential squad or something like that." Stavola then related his version of the events leading to his indictment and its aftermath. The following portion of the conversation is most relevant in deter-

mining Stavola's predisposition and intent to commit the offenses charged:

Sweeney:	...I can't promise you nothing, that's all I can say.
Stavola:	That's all you can say.
Martinelli:	Mike, Mike, I told him whatever it is let me know, you know what I am talking about.
Stavola:	It's just half-assed all the way down the line but it's gotten to the stage. (laugh)
Sweeney:	Look, you've gotten to the stage right now where your (sic) going to have to do something.
Stavola:	*Allright.*
Sweeney:	*Is it all right with you with the arrangements I made with him then?*
Stavola:	*Whatever.*
Martinelli:	*I told him whatever it is to let me know.*
Stavola:	*Yeah.* (emphasis supplied)

Martinelli telephoned Sweeney on January 7, 1971, in order to ascertain what progress, if any, had been made in attempting to "fix" Stavola's case. Sweeney indicated that he was making progress. Martinelli again telephoned Sweeney on January 23, 1971 and inquired as to his progress in "fixing" the case. Sweeney stated that he could not talk at that juncture. Again, on February 12, 1971, Sweeney received a call from Martinelli. Sweeney requested a meeting with Martinelli and Stavola.

On February 23, 1971, Martinelli telephoned Sweeney and "reveals for the first time an interest in personally benefiting monetarily from this deal." Pa 8.[1]

1. "Pa" refers to Petitioner's appendix.

A meeting was arranged for later that day at the Carriage House Restaurant. At this meeting Martinelli indicated that he had had some difficulty with Stavola because he had not received a Christmas bonus. Martinelli then informed Sweeney that the money to fix Petitioner Stavola's case would come from the principal, *i.e.*, Stavola. He further noted that Stavola was aware of the arrangements and had requested Martinelli to meet with Sweeney.

On February 25, 1971, Sweeney and Martinelli again met in the parking lot of the Carriage House Restaurant. "Martinelli appeared to be prompting Sweeney to impress Stavola with the seriousness of the situation...." Pa 8. The prompting seemed "to be the result of Martinelli's desire to jack the price up so that he and Sweeney could skim a profit out of the deal." Pa 9

At the conclusion of the conversation Martinelli entered the restaurant and returned with Stavola. Sweeney indicated to Stavola the seriousness of his situation, a potential ethnic bias and the alleged penalty attached to the offense in question. Stavola and Sweeney then discussed the price for fixing the former's case. It was agreed that they would meet the following day at the Holiday Inn in Princeton, New Jersey.

The following day Stavola and Sweeney met and conversed in the parking lot. During that conversation petitioner Stavola said:

> Stavola: Gee, yeah, here, here's the thing. I feel this, *I do a lot of business with a different jobs and they, they cross a few bucks here and there, its a way of life and I'd rather have it,* like with me and you but when I leave you. (emphasis supplied)

Stavola and Sweeney then haggled over the amount of money that *he*, Stavola, would pay. Stavola agreed to pay $5,000 for the judge, $5,000 for a prosecutor and $5,000 for the "middle man." Stavola then continued by stating that:

> "Stavola: – (inaud), they only know me as Mike Stavola and nothing else and I couldn't begin to tell ya of my other deals that I've had in other than my word

is bond, I'll tell ya what I'll do with ya before I leave tonight I'll give you five." Pa9 and 10.

Sweeney and Stavola met that evening at the Colts Neck Inn. Petitioner Stavola gave Trooper Sweeney $5,000 and then left the scene.

At the trial, Sweeney affirmatively stated that he did not refuse, or accept Martinelli's offer to help Stavola out of his difficulties since, "if it were in fact a bribe offer I would have pursued it in hopes of arresting him for attempting to bribe a State Trooper." (1T229-4 to 6). Throughout the trial Sweeney never deviated from the fact that he was playing the role of a "crooked cop" and that he was attempting to ascertain if Stavola was in fact seeking to have his case "fixed." (1T293-8 to 12; 1T399-1 to 11; 1T539-17 to 20).

On the basis of the foregoing facts, Petitioner was convicted of bribery and obstruction of justice. The convictions were affirmed by the New Jersey Superior Court, Appellate Division on August 3, 1973. The New Jersey Supreme Court denied Certification on October 2, 1973. Thereafter, Petitioner filed a petition for writ of certiorari to the Appellate Division, Superior Court of New Jersey.

ARGUMENT

POINT I

THE DEFENSE OF ENTRAPMENT IS NOT OF CONSTITUTIONAL DIMENSION AND THE POLICE CONDUCT IN THIS CASE COMPORTED WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Despite its recent vintage Petitioner implores this Court to reverse its well considered opinion of *United States v. Russell*, 411 *U.S.* 423, 93 *S.Ct.* 1637 (1973). The Petitioner urges that this Court wrongly decided *Russell* by finding that the defense denominated as "entrapment" is not of constitutional magnitude, and therefore, inapplicable to the states through the due process laws of the Fourteenth Amendment. The only inference which may be gleaned from the question presented by Petitioner is that, in his view, this Court hastily decided *Russell* and is now predisposed to overturn its holding barely nine months after its rendition. The State of New Jersey submits that the issue raised by Petitioner obviously lacks merit, especially in view of the fact that it has been recently decided adversely to him by this Court. In addition, as this Court indicated in *Russell*, the defense of entrapment has no nexus to any of the enumerated amendments contained in the Bill of Rights and should not be subsumed therein. Lastly, the conduct in the instant case was compatible with the dictates of the due process clause of the Fourteenth Amendment.

Petitioner's principle contention is that the defense of entrapment should be incorporated within the Fifth Amendment's due process provision and made applicable to the states through the Fourteenth Amendment. It would then necessarily follow, according to Petitioner, that the states would be compelled to enter judgments of acquittal in those cases where government agents or police officers unduly enmeshed themselves in a criminal enterprise. This strained interpretation of the Bill of Rights was laid to rest in *United States v. Russell, supra*. There this Court rejected the contention advanced herein that the defense of entrapment is constitutionally grounded in the due process clause of the

Fifth Amendment. 92 *S.Ct.* at 1642 and 1643. In response to the contention that the exclusionary rule should be applicable to entrapment situations the Court held:

> "But he would have the Court go further in deterring undesirable official conduct by requiring that any prosecution be barred absolutely because of the police involvement in criminal activity. The analogy is imperfect in any event, for the principle reason behind the adoption of the exclusionary rule was the government's 'failure to observe its own laws.' (citation omitted). Unlike the situations giving rise to the holdings in *Miranda*, the government's conduct here violated no independent constitutional right of the respondent." 93 *S.Ct.* at 1642.

Thus, the defense of entrapment is not of constitutional magnitude.

Petitioner also seeks to broaden the defense of entrapment so that it would be made applicable to the states when it is found that the criminal conduct would not have been possible had not the government actively participated in the transaction. Again, *Russell* is dispositive. There this Court declined to overrule *Sherman v. United States*, 356 *U.S.* 369 (1958) and *Sorrells v. United States*, 287 *U.S.* 345 (1932). Those cases established the well-settled doctrine that a defense of entrapment would only succeed where it may be shown that the defendant did not possess the requisite predisposition to commit the crime. Predisposition, and not governmental participation, is the test. The courts of New Jersey have adopted the *Sherman* and *Sorrells* criteria for determining the viability of an entrapment defense. See *State v. Dolce*, 41 *N.J.* 422, 430-32 (1964). Thus, the defense of entrapment is not of constitutional dimension, and therefore is not applicable to the states through the Fourteenth Amendment.

In *Russell*, this Court opined that it was not inconceivable that on some future date a situation would present itself where the conduct of law enforcement officials would be so "outrageous" that due process would absolutely bar prosecution. 93 *S.Ct.* at 1643. Nevertheless, this Court was unable

to find that the conduct in *Russell* was "outrageous" and "shocking to the universal sense of justice." *Ibid.* In *Russell*, the Federal Agent had supplied an ingredient essential to the manufacture of a drug in return for half of the output. Defendant was then charged with violation of the drug laws.

In the instant case Petitioner is hardly able to characterize the conduct of Officer Sweeney as "outrageous". Therefore, the sole test to be applied in this case is whether defendant Stavola had the requisite predisposition to commit the offense in question. The Appellate Division of the Superior Court found that "while the criminal design may have originated with Martinelli that design was clearly adopted by Stavola on December 18, 1970." Pa12. The factual finding below conclusively mandates against a finding of entrapment. Officer Sweeney merely afforded Petitioner Stavola and co-defendant Martinelli the opportunity to commit the offenses in question. *Russell, supra*, 93 *S.Ct.* at 1644.

Petitioner's agency theory of entrapment must also fail. Relying essentially on *United States v. Klosterman*, 248 *F.* 2d 191 (3 Cir. 1957) and *United States ex rel. Hassell v. Mathues*, 22 *F.*2d 979 (E.D. Pa. 1927), Petitioner has constructed an agency theory whereby he seeks to charge the State of New Jersey with the actions of Martinelli as an agent of Trooper Sweeney. The argument is founded on the premise that a third party (Martinelli) can be induced by the State (Sweeney) to procure the commission of a criminal offense by a particular defendant (Stavola) without the third party having any knowledge of the government's objective. Petitioner's contrived theory is not applicable in this case.

As already noted, it has been found that defendant Stavola adopted Martinelli's criminal design on December 18, 1970. Therefore, *United States v. Klosterman, supra*, is factually distinguishable. In *Klosterman, supra*, the defendant had abandoned his original criminal plan. Nevertheless, the overreaching tactics of the police officials compelled the defendant to commit a crime he would otherwise not have committed. In the instant case there is no evidence indicative of Stavola's abandonment of his criminal design. Pa12. So too, the holding in *United States ex rel. Hassell v. Mat-*

hues, supra, is distinguishable. There it was found that the crime was wholly manufactured by the Government and that the government agent was unwillingly induced to entrap defendant. *Id.* at 479. Here, there is no evidence to establish that Martinelli was entrapped. Therefore, it was not at the State's direction that Martinelli approached Stavola. He was propelled by his own avarice. See: Orfield, "The Defense of Entrapment in the Federal Courts," 1967 Duke L. J. 39, 45; and Note, 45 *B.U.L. Rev.* 542, 563-64 (1965). For other holdings in the federal courts sustaining the respondent's view see: *United States v. Comi*, 336 *F.*2d 856 (4 Cir.), *cert.* den. 379 *U.S.* 992 (1964); *United States v. Romana*, 278 *F.*2d 202, 204 (2 Cir. 1960); *Crisp v. United States*, 262 *F.*2d 78 (4 Cir. 1958); *United States v. Perkin*, 190 *F.*2d 49 (7 Cir. 1951); and *Polski v. United States*, 33 *F.*2d 686 (8 Cir.), *cert.* den., 280 *U.S.* 591 (1929). See also, Donnally, "Judicial Control of Informants", 60 *Yale L.J.* 1108.

On the basis of the foregoing, the State of New Jersey submits that the defense of entrapment should not be incorporated into the Bill of Rights and made applicable to the state courts through the due process clause of the Fourteenth Amendment. Further, the law enforcement conduct here stopped far short of violating "that fundamental fairness, shocking to the universal sense of justice" mandated by the due process clause of the Fifth Amendment. *Russell, supra,* 93 *S.Ct.* at 1643.

POINT II

PETITIONER'S VARIOUS MOTIONS FOR SEVERANCE WERE PROPERLY DENIED AND HE SUFFERED NO IRREPARABLE PREJUDICE.

Petitioner would have this Court grant certiorari on a totally unsupported assumption that he was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment by the trial court's failure to sever co-defendant Martinelli from the trial. That this contention falls short of the mark is readily apparent. The claim presented here is couched in "due process terms." Petitioner, like so many other litigants seeking relief in the federal courts, has tagged on to his claim of error the ritualistic label of "due process." In fact, the granting of a motion for severance is a discretionary act with the trial court. Clearly, it is not of a constitutional hue. The denial of a severance motion will not warrant a reversal unless it is known that the trial court has committed a gross abuse of discretion. See *State v. Yormark*, 117 *N.J. Super.* 315 (331, 332) (App. Div. 1971), certif. den. 60 *N.J.* 138 (1972), *cert.* denied 408 *U.S.* 925 (1972). Therefore, absent a showing that petitioner has suffered a deprivation of his Fifth or Sixth Amendment rights the question of severance must be left to the state courts.

The crux of Petitioner's severance claim is that the joint trial caused his entrapment defense to suffer irreparably. It is asserted that Stavola's defense was based upon two theories of entrapment. "First, that Sweeney entrapped him on February 25, 1971, when Sweeney said he would make a deal with the judge and the prosecutor. Second, he was entrapped by Martinelli, who as Sweeney's agent, conveyed that Sweeney would make a 'deal' for him." P14. As has already been related, the New Jersey Superior Court, Appellate Division found that Sweeney did not entrap Stavola on February 25, 1971. Rather, the court found that while the criminal design may have originated with Martinelli, that design was clearly adopted by Stavola on December 18, 1970 and never abandoned thereafter. Therefore, both alleged theories of entrapment are factually precluded. Even assuming that the entrapment

defense was viable, the trial court properly admitted conversations between Martinelli and Sweeney with limiting instructions sufficient to preclude any prejudice.

Rule 63(9) of the *New Jersey Rules of Evidence* allows admission at trial of statements made by a party while participating in a plan to commit a crime or civil wrong, so long as the statement was made in furtherance of that plan. This *Rule* is similar to that in many other jurisdictions. See Garland and Snow, "The Co-conspirators Exception To The Hearsay Rule: Procedural Implementation and Confrontation Clauses Requirements." 63 *J. Crim. L.* and *P.S.* 1 (1972). The case law in this jurisdiction and elsewhere affirms the use of the co-conspirator exception rule even when a conspiracy is not charged. See, *e.g.*, *Dutton v. Evans*, 400 *U.S.* (1970), and *State v. Rios*, 17 *N.J.* 372 (1955). Thus, although the jury returned a not guilty verdict as to the conspiracy count, Martinelli's statements as they related to Stavola were properly admitted. In *Dutton v. Evans, supra*, this Court held that the co-conspirator hearsay exception does not violate the confrontation clause of the Sixth Amendment. Therefore, there is no constitutional issue as to the admission of these statements.

As to those statements which did not relate to Stavola, the trial court on several occasions instructed the jury that these conversations could only be used as evidence against Stavola if it was first determined that a conspiracy existed. In the course of its charge to the jury the court again "alluded to this principle of law." See Pa17. Therefore, Martinelli's statements as they related to Stavola were properly admitted under the co-conspirator exception prior to the jury's determination of whether a conspiracy conviction was warranted. The trial court's instructions limited the jury to consideration of these statements only if such a conspiracy was found to exist

Petitioner lastly complains of the trial court's failure to give Petitioner Stavola's requested instruction regarding the question of whether Martinelli was Trooper Sweeney's agent for the purpose of passing on the entrapment defense. The Appellate Division of the Superior Court correctly disposed

of this allegation when it found that the testimony "clearly indicates that Martinelli originated the criminal design in October, 1970; he was not acting on behalf of the State Police. *Cf. United States v. Romano*, 278 *F.*2d 202, 204 (2 Cir. 1960). Martinelli's criminal activity was adopted by Stavola no later than December 18, 1970, and was never thereafter abandoned by him. Hence the trial judge properly refused the requested instruction." See Pa12 and 13. Furthermore, since there was ample evidence demonstrating Stavola's predisposition to commit the crimes charged, the issue of entrapment was properly submitted to the jury for decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should not issue.

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